IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CLIFTON JEROME EPPS,
Appellant.

No. 2 CA-CR 2012-0430
Filed February 19, 2014

Appeal from the Superior Court in Gila County
No. CR201100229
The Honorable Robert Duber II, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Clifton Jerome Epps, Kingman
In Propria Persona

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

M I L L E R, Judge:

¶1 Clifton Epps was convicted after a jury trial of transporting marijuana for sale, possession of marijuana, and possession of drug paraphernalia. Epps argues his rights to due process and a speedy trial were violated because of pre- and post-indictment delay, the trial court erred in amending the indictment, the composition of the jury pool violated the equal protection clause, and the court erred in denying his motion for judgment of acquittal. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 We review the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In May 2009, Epps and his nephew, Dominique, were employed as tandem-driving, commercial long-haul truckers. As they were transporting produce through a remote, mountainous area of Arizona, their semi-trailer truck failed to negotiate a curve and tipped over onto its side. Officers arrived on scene and smelled an overwhelming odor of fresh marijuana emanating from the truck's cab. A short time later, two boxes and three duffle bags containing a total of eighty-three pounds of marijuana were discovered nearby the truck. In addition to the boxes and duffle bags, officers discovered a personal toiletry bag belonging to Epps that contained a personal-use amount of marijuana.

¶3 In April 2011, Epps was indicted and charged with transportation of marijuana for sale, simple possession of marijuana, and possession of the baggie in which the personal-use amount of

marijuana was found.[1] At the conclusion of trial, in August 2012, Epps was found guilty and sentenced to presumptive, concurrent prison terms, the longest of which was five years. This timely appeal followed.

Speedy Trial Rights

¶4 Epps argues the trial court erred when it denied his motion to dismiss criminal charges with prejudice due to both pre- and post-indictment delay. Epps contends, as he did below, the two-year delay from the accident to the state's filing of charges as well as the sixteen-month period from the indictment to the August 2012 trial violated his Sixth Amendment right to a speedy trial and his right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.[2] We review a court's ruling on a motion to dismiss criminal charges for an abuse of discretion. *See State v. Medina*, 190 Ariz. 418, 420, 949 P.2d 507, 509 (App. 1997).

Pre-Indictment Delay

¶5 Epps generally argues that any delay between the end of the state's investigation, which he alleges was July 2009, and the filing of charges in April 2011 was "presumably intentional and tactical" and thus violated his due process rights. With respect to pre-indictment delay, the right to due process guaranteed by the Fifth and Fourteenth Amendments protects a defendant against stale prosecutions. *State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (1996). A defendant "must show that the prosecution intentionally

[1] At the state's request, a fourth charge, count three, was dismissed with prejudice on the first day of trial.

[2] To the extent Epps also claims any pre-indictment delay violated his Sixth Amendment right to due process, he fails to develop this argument and therefore we do not address it. *See* Ariz. R. Crim. P. 31.13(c) (setting forth contents appellate briefs must have, including argument and citation to authorities); *State v. Sanchez*, 200 Ariz. 163, ¶ 8, 24 P.3d 610, 613 (App. 2001) (claim waived because defendant failed to develop argument in brief).

slowed proceedings to gain a tactical advantage or to harass the defendant, and that actual prejudice resulted." *Id.*

¶6 Here, Epps has failed to demonstrate that the state intentionally filed the charges when it did in order to gain a tactical advantage or to harass him. Indeed, Epps acknowledged below that "[t]he case languished for no reason" and that he had "no ability to show that the government intentionally delayed the prosecution to obtain a tactical advantage." Epps repeats these concessions on appeal and further states that "[t]here is no explanation" for the delay between the end of the investigation and the filing of charges against him.

¶7 Moreover, Epps has failed to show that he was prejudiced by any pre-indictment delay. Epps claims that some of the witnesses' memories had faded but does not identify which witnesses he is referring to and how such failures of memory prejudiced his defense. Similarly, Epps contends that the pre-indictment delay resulted in fingerprint evidence not being preserved, but again fails to demonstrate how fingerprint preservation was affected by the period of time between the end of the state's investigation and the filing of charges against him.

¶8 Epps also points to misplaced log books that detailed when he or Dominique had been driving and resting, as evidence of prejudice from pre-indictment delay. The log books were located by an officer immediately after the accident, but it is unclear what happened to them. Epps does not demonstrate how the delay caused the log books to be unavailable nor can he show that their absence from trial prejudiced him. Despite his contention that the log books "would have been a record to show who the driver was and whether or not there was a co-driver," the log books were unnecessary to establish these facts. At trial, during his opening statement, Epps expressly conceded that Dominique was driving at the time of the crash and that Epps was the co-driver. *See State v. Gray*, 231 Ariz. 374, ¶ 9, 295 P.3d 951, 954 (App. 2013) (admissions in opening statements generally binding on party). In addition, Epps's own sworn testimony during a civil trial pertaining to the crash acknowledged that he and Dominique drove as a team, explaining

they would take turns driving while the other slept. Epps's sworn testimony was presented to the jury.

¶9 Finally, Epps appears to argue that he had an independent right to be brought before a magistrate at a preliminary hearing soon after law enforcement stopped its active investigation. He relies on the federal and state constitutions, as well as Rules 2.3(a) and 4.2(c), Ariz. R. Crim. P. He correctly notes that the right to a preliminary hearing, as well as the constitutional protections at the hearing, do not apply to felony cases "commenced by grand jury indictment." Ariz. R. Crim. P. 4.2(c) cmt.; *see also* Ariz. Const. art. II, § 30. To the extent Epps argues he was denied due process of law because there was no arrest or complaint within a particular period of time that would have required a preliminary hearing, the argument is without merit. There is no constitutional right to be arrested even if there was a tactical advantage for the defendant to be arrested at a particular time. *See Hoffa v. United States*, 385 U.S. 293, 310 (1966); *State v. Carroll*, 111 Ariz. 216, 219, 526 P.2d 1238, 1241 (1974). Similarly, his reliance on Rule 2.3(a) and A.R.S. § 13-3903 is misplaced because the procedures he quotes only attach after arrest. *See State v. Lemming*, 188 Ariz. 459, 461, 937 P.2d 381, 383 (App. 1997) ("Our courts have consistently held that speedy trial rights do not attach under either our constitution or under the procedural rules enacted to implement the constitutional provisions until a prosecution is commenced or a defendant is held to answer."). Moreover, as with the constitution, Rule 2.3(a) and § 13-3903 do not specify a time period after the completion of an investigation in which an arrest must occur. *See Lacy*, 187 Ariz. at 346, 929 P.2d at 1294 (finding due process did not require dismissal on ground of pre-indictment delay of more than eight years); *State v. Dunlap*, 187 Ariz. 441, 450, 930 P.2d 518, 527 (App. 1996) ("Prior to arrest and official accusation, statutes of limitation provide the 'primary guarantee against bringing overly stale criminal charges.'"), *quoting United States v. Ewell*, 383 U.S. 116, 122 (1966). The trial court did not err in denying Epps's motion to dismiss the criminal charges on the ground of pre-indictment delay or the absence of a preliminary hearing.

Post-Indictment Delay

¶10 Epps next claims he was denied his right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. A defendant's "Sixth Amendment right to a speedy trial does not attach until an indictment has been returned or a complaint has been filed and a magistrate has found that probable cause exists to hold the person to answer before the superior court." *Medina*, 190 Ariz. at 420, 949 P.2d at 509. Although the Constitution guarantees criminal defendants "a speedy and public trial," it does not provide a defined time frame within which a defendant must be tried. U.S. Const. amend. VI. In *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972), the Supreme Court established a test by which courts determine whether a trial delay is sufficient to warrant reversal. The four-factor *Barker* test examines: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has demanded a speedy trial; and (4) the prejudice to the defendant. *Id.*; *State v. Schaaf*, 169 Ariz. 323, 327, 819 P.2d 909, 913 (1991). "In weighing these factors, the length of the delay is the least important, while the prejudice to defendant is the most significant." *State v. Spreitz*, 190 Ariz. 129, 139-40, 945 P.2d 1260, 1270-71 (1997). We therefore apply the *Barker* test to the facts of the case at bar.

¶11 Epps was indicted on April 20, 2011, and his trial began almost sixteen months later on August 15, 2012. Although the time frame provided in the Arizona Rules of Criminal Procedure is not determinative of our constitutional analysis, this time period is significantly longer than the 180-day restriction in which a defendant released from custody must be tried. Ariz. R. Crim. P. 8.2(a)(2); *see also Schaaf*, 169 Ariz. at 327, 819 P.2d at 913 ("[T]he rule 8 requirements restrict the state more than either the state or federal constitutions."). Therefore, the sixteen-month delay is significant. *See Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992) ("[L]ower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year."). It does not mean, however, Epps was automatically entitled to relief; rather, he was still required to establish the delay was prejudicial. *See Spreitz*, 190 Ariz. at 140, 945 P.2d at 1271 (five-year delay, though presumptively prejudicial, insufficient to vacate conviction where

other factors weighed against reversal). A delay can weigh strongly against the state when it is the product of a "deliberate attempt to delay the trial in order to hamper the defense." *Barker*, 407 U.S. at 531. Other "more neutral reason[s]" for state-engendered delay, such as negligence, weigh less heavily against the state. *Id.*

¶12 Even assuming the sixteen-month period from indictment to trial is presumptively prejudicial, *see Doggett*, 505 U.S. at 652 n.1, the facts of this case demonstrate the delay resulted primarily from Epps's actions and requests, including the substitution of counsel about one month prior to the original trial date, *see United States v. Williams*, 557 F.3d 943, 949 (8th Cir. 2009) ("'Delays which have been caused by the accused himself cannot, of course, be complained of by him.'"), *quoting Shepherd v. United States*, 163 F.2d 974, 976 (8th Cir. 1947); *Spreitz*, 190 Ariz. at 138, 945 P.2d at 1269 (delays resulting from defendant's requests excluded from speedy trial limits). We also note that Epps did not advise the court about the expiration of time limits as required by Rule 8.1(d), Ariz. R. Crim. P.[3], nor did he otherwise assert his speedy trial rights until he moved to dismiss the criminal charges one month before trial. Moreover, Epps was not prejudiced by any delay. To the contrary, his defense would likely have been hindered had newly appointed counsel not been given sufficient time to prepare for trial. Thus, having considered the *Barker* factors in light of the circumstances of this case, we find no violation of Epps's right to a speedy trial under the Sixth Amendment. *See Spreitz*, 190 Ariz. at 140, 945 P.2d at 1271.

Amended Indictment

¶13 Epps argues the trial court violated his right to due process by amending the indictment "without the concurrence of a Grand Jury." Because he raises this claim for the first time on

[3]Rule 8.1(d) requires defense counsel to advise the court of any impending time limit expiration in the defendant's case. "Failure to do so may result in sanctions and should be considered by the court in determining whether to dismiss an action with prejudice pursuant to Rule 8.6[, Ariz. R. Crim. P]." Ariz. R. Crim. P. 8.1(d).

appeal, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶14 The state charged Epps with possession of marijuana, count two, in violation of A.R.S. §§ 13-3405(A)(1) and (B)(1), as well as A.R.S. § 13-303, which outlines accomplice liability. At the beginning of trial, the state moved to amend count two of the indictment "to reflect just the simple possession, without an allegation of accomplice." Epps did not object to the proposed amendment, stating he "understood the [state's] theory from the beginning."

¶15 Epps now contends the state "moved the Court to dismiss the charge of possession of marijuana as an accomplice, to add a new charge of possession of marijuana" and that these were two "different charge[s]" with "different elements." Under Arizona law, however, "an accused is a principal regardless of whether he directly commits the illegal act or aids or abets in its commission." *State v. McInelly*, 145 Ariz. 161, 163, 704 P.2d 291, 293 (App. 1985). Here, Epps was afforded due process through adequate notice of the charges against him. *See id.* He was informed of the crimes of which he could be convicted and the state was not required to inform Epps of how his responsibility for those offenses was to be proved. *See State v. Tison*, 129 Ariz. 526, 538, 633 P.2d 335, 347 (1981). Thus, we conclude that there was no error, fundamental or otherwise, in amending the indictment.

Batson Challenge

¶16 Epps argues the trial court "committed fundamental error by excluding African Americans from the . . . jury," in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Epps relies on *Batson v. Kentucky*, 476 U.S. 79 (1986) for the proposition that the absence of African Americans on the jury requires dismissal of his convictions and sentences. In considering a *Batson* challenge, we review de novo the trial court's application of law but defer to its factual findings, unless they are clearly erroneous. *State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001).

¶17 The court identified juror number forty-two, a woman with a Hispanic surname, as "the only member of a minority group that was struck by the State." The state explained that it struck juror forty-two out of concern that her "fairly forceful personality . . . would control the jury and encourage people to vote in a way that they did not want to." The court found that there was no "racially motivated basis for striking [juror forty-two]." However, the state decided to withdraw its preemptory strike of juror forty-two in order to keep two alternates on the jury, after juror fifty—Epps's final preemptory strike—was removed for cause due to racial bias. Epps used his final preemptory strike on juror forty-four and juror forty-two was ultimately seated on the jury.

¶18 The Supreme Court has outlined a three-part test to determine whether a preemptory strike runs afoul of the Equal Protection Clause of the Fourteenth Amendment. *See Johnson v. California*, 545 U.S. 162, 168 (2005); *Batson*, 476 U.S. at 96-98. First, the defendant must make a prima facie showing of discrimination on the basis of race. *Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d at 162. Next, the state must offer a neutral explanation for the strike. *Id.* Finally, after a neutral explanation has been offered, the defendant "must persuade the trial court that the [state's] reason is pretextual and that the strike is actually based on race." *Id.*

¶19 Here, the trial court identified juror forty-two as potentially having been stricken for a reason that violated *Batson*. The state provided a neutral basis for the strike and Epps failed to persuade the court that the state's reason was merely pretextual. Moreover, the juror in question was ultimately seated on the jury, rendering moot any potential discrimination with respect to juror forty-two. Thus, the trial court did not err when it denied Epps's *Batson* challenge.

¶20 Finally, although Epps relies exclusively on *Batson* and its progeny in his opening brief, he includes his personal observation that "there [were] no African Americans in the courtroom at all." As such, it appears to be an argument that the lack of any African American jurors on the venire panel violated his constitutional rights. We first note that the absence of this argument in the statement of issues usually precludes consideration of it. *See*

Ariz. R. Crim. P. 31.13(c)(1)(v). In view of his self-represented status, however, we waive that rule. Rule 2.2 cmt. 4, Ariz. Code Jud. Conduct, Ariz. R. Sup. Ct. 81 (permissible "to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard").

¶21 In the trial court, Epps passed the venire panel[4] but, after the strikes were made, stated his concern that there were "no blacks on the prospective jury pool," for which the court observed there should be a "*Batson* record." Epps seemingly agreed. What ensued was a discussion about the general absence of African Americans in the community, the state's strikes, testimony by the jury commissioner, and follow-up questions to the remaining jurors about whether the defendant's race would affect their deliberations or consideration of the evidence. Independent of his *Batson* challenge, Epps moved to strike the entire panel because the zip code system used by the jury commissioner was "not a true random selection of all of Gila County." Viewing the argument most favorable to Epps, we will consider it as a claim that the venire panel violated the fair cross-section requirement of the Sixth Amendment to the United States Constitution. *See State v. Sanderson*, 182 Ariz. 534, 537-38, 898 P.2d 483, 486-87 (App. 1995). To make a prima facie showing, the defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

---

[4]Approving the panel at the conclusion of voir dire generally waives objection to the panel. *Cf. State v. Milke*, 177 Ariz. 118, 122, 865 P.2d 779, 783 (1993). Because the trial court considered the objections, we address the merits.

Id. at 538, 898 P.2d at 487, *quoting Duren v. Missouri*, 439 U.S. 357, 364 (1979). Epps offered no evidence on any of these factors. Therefore, to the extent Epps challenges the venire panel due to the absence of African Americans, we conclude the record does not support the claim.

Motion for Judgment of Acquittal

¶22 Epps contends the trial court erred in denying his motion for judgment of acquittal, pursuant to Rule 20, Ariz. R. Crim. P., made at the close of the state's case-in-chief. We review the court's denial of a Rule 20 motion de novo, viewing the evidence in the light most favorable to sustaining the verdict. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011).

¶23 A motion for judgment of acquittal should be granted only if "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20; *see also State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996) (judgment of acquittal appropriate only if no substantial evidence to warrant conviction). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). "If reasonable minds can differ on the inferences to be drawn from the evidence, a trial court has no discretion to enter a judgment of acquittal and must submit the case to the jury." *State v. Alvarez*, 210 Ariz. 24, ¶ 10, 107 P.3d 350, 353 (App. 2005), *vacated in part on other grounds*, 213 Ariz. 467, 143 P.3d 668 (App. 2006).

¶24 The evidence established that, as they were investigating the accident scene, multiple officers noticed a strong odor of fresh marijuana emanating from the cab of the semi-trailer. A passenger in a vehicle immediately behind the semi-trailer who had witnessed the accident testified that she saw Dominique removing items from the cab and officers eventually located three duffle bags and two boxes containing marijuana, weighing

approximately eighty-three pounds altogether. In addition, a toiletry bag was found containing a medical card and a lab report for Clifton Epps. Inside this toiletry bag was a "personal use bag" of marijuana. Furthermore, one of the EMTs who provided Epps with medical care smelled an odor of marijuana smoke emanating from Epps's person.

¶25 Based on the evidence presented, reasonable persons could conclude that the baggie of personal use marijuana found in the toiletry bag belonged to Epps. In addition, the jury could reasonably conclude Epps and Dominique were transporting the large amount marijuana discovered on the other side of a barrier immediately adjacent to their truck, given that Dominique was seen removing items from the cab and that the cab had a very strong odor of marijuana. Accordingly, substantial evidence was presented at trial to sustain Epps's convictions.

Disposition

¶26 For the foregoing reasons, we affirm Epps's convictions and sentences.